No. 83-1652

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PAPAGO TRIBAL UTILITY AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY OF PAPAGO TRIBAL UTILITY AUTHORITY TO OPPOSITION TO PETITION FOR CERTIORARI

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Our opponents admit that the first issue in this case is whether ". . . the Court of Appeals [correctly] approved the judgment of the Commission as to the applicable standard of proof required to approve a rate change under Section 206 of the Federal Power Act." (Arizona Public Service Co. Br., p. 8). Both the Commission and the Court below base their decision on an interpretation of the agency's statutory powers under Section 206, which rests on the theory that it may act either to protect the public interest or to protect the private interest of the regulated utility when a rate is below the "just and reasonable rate" level specified in Section 206(a), 16

U.S.C. § 824e. Our opponents concede, as they must, that petitioner has a Section 206 contract which, as held by the Court of Appeals, *Papago Tribal Utility Authority* v. *FERC*, 610 F.2d 914, (D.C. Cir. 1979) ("Papago I"), cannot be changed by a company rate filing but can only be changed by order of the Commission. This hard fact exposes the fallacy of the efforts by the Commission and Arizona Public Service Company (APS) to obscure the true issue, which is one of statutory interpretation, by pretending that the issue is only one of the interpretation of the terms of our particular contract. No language in our contract specifies the standards the Commission is to use to make a rate change in the contract rate. Therefore, the statutory standard which governs the Comission's Section 206 powers to override private contracts must govern, and it is the interpretation of that standard which is at issue in this case where the Court below has made a ruling squarely in conflict with this Court's prior holdings.

1. Neither the Commission nor APS denies the truth of PTUA's claim (Pet. pp. 13-14) that this fundamental question of statutory interpretation is one of great importance to the administration of the Power Act. In this connection, PTUA invites the Court's attention to the fact that neither the Commission nor APS denies that the Court below and the Commission have made the new change in law retroactively effective to all existing Section 206 contracts. APS simply makes the self-serving, but wholly unsupported, statement that there are relatively few contracts similar to the one at issue here, and that the vast majority of wholesale contracts permit Section 205 rate changes. The Commission simply states, again without any support, that the question of whether the Court below erred in making the change of law retroactively effective does not present an issue of gener-

al importance (presumably because APS has made the self-serving statement that there are very few such contracts). Thus, PTUA's claims as to the importance of this case stand unrebutted by any fact.

2. The Commission contends (Br., pp. 6-7) that PTUA's contention that the "public interest" standard governs all contracts made when both the Commission and all Courts believed that that was the sole standard governing the Commission's powers to change contract rates under Section 206 is "erroneous." But, the Commission neither rebuts the many cases cited by PTUA nor explains why its reasoning is wrong. APS does not even attempt to rebut PTUA's claim that the Court below committed an egregious error in making its change of law retroactively effective. Thus, this is an appropriate case for summary reversal on the basis of this single error, even if the Commission were right (and we have shown they are wrong) that the issue is not one of general importance.

3. The basic position of the Commission and APS is that Section 206(a) grants the Commission the power to override contracts when such action is necessary to protect the public interest or when such action is necessary to protect the private interest of the regulated utility in receiving no less than a just and reasonable rate of return. Thus, the validity of the interpretation of the statute here at issue made by both the Commission and the Court below rests on a radical dichotomy between the "public interest" and "just and reasonable" standards. This Court flatly rejected precisely this theory, advanced by the Commission in *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 352 (1956).

In *Sierra*, the Commission held that the contract was a Section 205 going rate contract. 350 U.S. at 352. *Sierra* claimed that its contract rate would be reviewed, if at all,

only under Section 206. The Commission in its rate order held that even if *Sierra* was correct, the contract rate must be increased because it was unjust and unreasonable. 350 U.S. at 354. It found the contract rate was unjust and unreasonable because it would produce a return lower than the return the Commission had there found to be just and reasonable. *Id.* This interpretation of the terms "unjust" and "unreasonable" (which is the same one used by the Commission and the Court below here) was rejected by this Court in *Sierra*. This Court stated at 355:

> When § 206(a) is read in the light of this purpose (i.e., the scheme of regulation is to protect the public interest), it is clear that a contract may not be said to be either "unjust" or "unreasonable" merely because it is unprofitable to the public utility.

4. The Commission (pp. 5-7) and APS (pp. 12-13) argue that the *Mobile-Sierra* doctrine permits the parties to enter a contract whereby they ". . . have agreed to eliminate the utility's right to file new rates under Section 205, *but have left unaffected the Commission's power to replace unjust and unreasonable rates under Section 206 upon request of one of the parties.*" (Emphasis added; APS Br., p. 12). The short answer to this claim is that if the Commission lacks such power because just and reasonable rates under Section 206 are coextensive with rates contrary to the public interest under that section, the fact that a contract does not deprive the Commission of a power it does not have is irrelevant. Thus, the so-called "contract" argument is seen to be dependent upon the assumption that the Commission and APS are correct in their basic interpretation of the scope of the Commission's statutory powers under Section 206(a), which is, as they admit by their silence, a certworthy issue.

5. The Commission contends that the filed rate doctrine only prohibits a utility from collecting unfiled rates (Br. p. 7), and that here APS' rates were filed and in effect from August 1, 1978 forward. The Commission again misstates the law. In *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), this Court held that the filed rate doctrine "forbids a regulated entity from charging rates for its services other than those *properly* filed with the appropriate federal regulation authority." 453 U.S. at 577 (emphasis added). In this case, the Court in *Papago I*, cited *supra* at 928, held that the instant rate had not been properly filed. This rendered that rate filing void. As this Court stated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956), when, as here, a utility lacks the contractual power to make unilateral rate filings, such a filing is "a nullity insofar as it purport[s] to change the rate set by its contract . . . and that the contract rate remained the only rate."

6. The Commission (Br., p. 8) misstates the facts in stating that *Papago I* ". . . did nothing more than *remand* the case to the Commission. . . . ." For, that Court *reversed* the case as to PTUA and Electrical District No. 1, and remanded it for further proceedings. (*Id.* at 930). We have shown (Pet. pp. 10-11) that the August 1, 1978 Order did not meet the test of Section 206, and the express findings required by Section 206 were not made until January 25, 1982. Therefore, there was no legally filed rate before that date, and the Order on Remand violates the filed rate doctrine. A new rate may not be implemented until the proper Section 206 findings have been made. *Sierra*, *supra*, 350 U.S. at 353. Contrary to the tacit assumption made by the Commission and APS, *Sierra* holds only that a *new hearing* may be unnecessary; it does not hold that even if proper evidence is already of record, the rate fixed by the Commission after a judicial reversal may be made *retroactively effective*.

7. The Commission (Br., p. 18) and APS (Br., p. 14) flatly misstate the true facts in stating ". . . the Commission in its 1978 Order in effect found the existing rates unjust and unreasonable, thus meeting the 'substantial purpose' of the Section 206(a) requirement" (Br., p. 18). APS makes the exact same misstatement in claiming an equivalence between the ". . . Commission's explicit finding at that time [in 1978] with respect to other customers whose contracts with APS had been determined to fall within the category of Section 206 . . ." and the PTUA contract (Br., p. 14). These misstatements are of crucial importance, because they are the nub of our opponent's arguments that there was ample evidence in the Commission's 1978 decision to support its finding made 42 months later that PTUA's existing contract rates were unjust and unreasonable within the purview of Section 206(a). The true facts are that the Commission expressly held in its Order on Remand of January 25, 1982 that Section 206 requires the utility's pre-existing rates to be found unjust and unreasonable, and that such findings had to be made with respect to PTUA and Electrical District No. 1. (Appendix, p. 10). But, the Commission's August 1, 1978 Order Affirming Initial Decision (R. 177),[1] did nothing more than affirm its Administrative Law Judge's Initial Decision on Application for Rate Increase of December 19, 1977 (R. 132). In his decision, the Law Judge found that it was unnecessary to make any findings concerning the lawfulness of the existing rate, and he found only that the new rate filed by APS under Section 205 was just and reasonable. Thus, he held:

> In the context of this proceeding, *a finding that a new rate to the Districts is just and reasonable would mean that the existing rate is unjust and unreasonable*. And the "adversely-affect-the-public-interest"

[1] References to the Certified Record in D.C. Circuit Nos. 82-1338 and 1339 shall hereafter be designated (R.____).

> criterion for increasing an existing contractual rate, set forth in *Sierra Pacific*, is not applicable. (Emphasis added, footnote omitted).

APS argues (p. 13), citing *United Gas Improvement Co.* v. *Callery Properties*, 358 U.S. 103 (1958), that on remand the Commission properly related the effective date of the rate prescribed in the Order on Remand back to the date of its rate order in the same docket, August 1, 1978. Thus, it denies that there was retroactive ratemaking. This argument suffers from several flaws. First, this entire argument is a post hoc appellate rationalization which has no foundation in the Order on Remand. Second, *Callery* involved a remand of a rate fixing order, while this case involves a reversal of an agency order denying a motion to reject. Thus, after this Court's decision in *Papago I*, there was no longer any rate proceeding with respect to PTUA to which the Commission could relate back the rates prescribed in the Order on Remand.

8. The Commission (Br. p. 8) and APS (Br. p. 14) attempt to distinguish *Southern Union Gas Co.* v. *FERC*, 725 F.2d 99 (10th Cir. 1984), which PTUA showed was in conflict with the decision below (Pet. p. 15), on the spurious ground that there, unlike here, there was no filed rate. The short answer to this claim is that we have already shown (p. 5), *supra*, the APS filed rate was a nullity and thus the two cases are identical in this respect. APS also attempts to distinguish *Southern Union* on the equally false ground that the instant case involves a rate proceeding for which the record was not closed when the Commission corrected its error, whereas the record was closed in *Southern Union*. (Br. p. 14). But, the record underlying the Commission's August 1, 1978 Order in this docket was closed long before the Court issued its Order in *Papago I* on January 11, 1980. APS' claim (*Id.*) that

Southern Union involved an attempt by the Commission to make an exception to the filed rate doctrine for "egregious conduct," which element is lacking here, hurts rather than helps its cause. Certainly, if no such exception can be made to punish a wrongdoer who has deliberately violated the Commission's enabling act, it is improper to make such an exception where no such violations by anyone have been found.

CONCLUSION

For the foregoing reasons and those presented in our petition, it is respectfully submitted that PTUA's petition for certiorari and motion for summary reversal should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 1984, 3 printed copies of the foregoing Reply of Papago Tribal Utility Authority to Opposition to Petition for Certiorari were mailed, postage prepaid, to the following:

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